

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1438

COMMONWEALTH

VS.

JOSEPH R. ARRAIOL.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the District Court, the defendant, Joseph R. Arraiol, was convicted of motor vehicle homicide by negligent operation. On appeal, he contends that the admission of a witness's in-court identification at trial created prejudicial error. We affirm.

Background. At approximately 8 P.M. on June 25, 2015, witnesses observed a gray Volkswagen GTI (GTI), driven by Samantha Kewer, and a green Toyota RAV4 (RAV4), driven by the defendant, traveling east on Route 44 in Raynham. The two vehicles moved "aggressively," repeatedly attempted to pass and block each other, and "appeared to be playing cat and mouse." At one point, the GTI attempted to pass the RAV4 on the left, and the RAV4 "swerved over to the left to block [the GTI] from passing." Soon thereafter, the RAV4 traveled into the oncoming

lane, and passed the GTI on the left. The GTI attempted to move into the right lane, but could not do so because another vehicle was traveling in the right lane. According to Kewer, after the RAV4 "cut in front" of her, she "had to slam on [her] brakes" and "slid into oncoming traffic." According to another witness, the GTI "accelerated in the oncoming lane to try to get in front of the green RAV4." In either case, there is no dispute that the GTI struck an oncoming vehicle, and that the driver of the oncoming vehicle died from the multiple injuries sustained in the collision. Immediately after the collision, the RAV4 continued traveling eastbound, and never stopped.

Sergeant Detective William Donnelly of the Raynham Police Department responded to the accident scene and participated in the ensuing investigation. After learning that a green RAV4 was involved in the accident, he visited the defendant's apartment at 40 Ashland Street in Taunton. Upon arrival he observed a green RAV4 in the driveway. Next, Donnelly met with the defendant, who acknowledged that he drove the green RAV4 in the driveway, admitted that he was in the area of Route 44 in Raynham around 8 P.M. on the evening of the accident, but "said he wasn't involved in an accident and left Shaw's out the back way to head back home."<sup>1</sup>

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<sup>1</sup> A video recording of the defendant's interview was admitted in evidence.

Following her release from the hospital, Kewer went to the Raynham Police Department where she viewed photographs. She identified a photograph of the defendant as the individual that she believed was driving the green RAV4 on June 25, and initialed the page with the photograph. She indicated to the police that she was "[l]ike 90 percent" sure of her identification.<sup>2</sup>

Prior to trial, the Commonwealth moved in limine to allow Kewer to make an in-court identification of the defendant at trial. The judge allowed the motion over the defendant's objection. At trial, Kewer described the identification procedure, supra, and identified the photograph of the defendant as the driver of the green RAV4. She confirmed, before the jury, that she had indicated to the police that she was "[l]ike 90 percent" certain of her identification of the defendant from the photograph. Kewer subsequently identified the defendant in the court room as the individual who was driving the green RAV4 on June 25, 2015.

Discussion. The defendant claims that the judge abused his discretion in allowing Kewer's in-court identification of the defendant because her prior out-of-court identification was equivocal. In Commonwealth v. Collins, 470 Mass. 255, 259-267

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<sup>2</sup> The photographs shown to Kewer were marked as an exhibit at trial. The photograph of the defendant shows Kewer's initials ("S.K"), the date ("7/18"), and the notation "90%."

(2014), the Supreme Judicial Court (SJC) "announced a prospective rule requiring 'good reason' to admit an in-court identification by an eyewitness who participated in a nonsuggestive pretrial identification procedure but did not make 'an unequivocal positive identification of the defendant.'" Commonwealth v. Collins, 92 Mass. App. Ct. 395, 397 (2017), quoting Collins, 470 Mass. at 266. As the SJC subsequently clarified, "[a] witness makes an unequivocal positive identification when he or she successfully identifies the defendant as the perpetrator, such that the statement of identification is clear and free from doubt" (quotation omitted). Commonwealth v. Dew, 478 Mass. 304, 315 (2017).

Here, the Commonwealth contends that Kewer's out-of-court identification met the Dew standard because she selected only one photograph, did not identify anyone else as the perpetrator, and demonstrated and expressed practical certainty, such that it was within "the range of reasonable alternatives" for the judge to characterize the pretrial identification as unequivocal.

L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). See Collins, 92 Mass. App. Ct. at 398 ("On these facts we cannot say that it would be beyond the range of reasonable alternatives for the judge to characterize [the eyewitness]'s pretrial identification as unequivocal . . ."). The Commonwealth maintains that the added statement that Kewer was "90 percent"

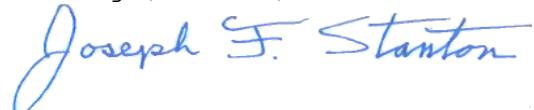
sure did not render the prior identification inadmissible, because a witness's utterance should not be determined by a narrowly literal analysis of the precise words used. See id. ("the judge permissibly could have found that [the eyewitness] did not equivocate and was sufficiently certain about his pretrial identification of the defendant").

We need not decide whether the judge abused his discretion because the in-court identification, even if improperly admitted, was not prejudicial as it "did not influence the jury, or had but very slight effect." Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). The case against the defendant was strong. Multiple witnesses identified a green RAV4 as the motor vehicle engaged in the dangerous and reckless "cat and mouse" game that caused the collision. The night of the incident, the officers' investigation led them to the defendant's apartment where a green RAV4 sat in the driveway. Moreover, the defendant admitted to driving the green RAV4, on the night of the incident, at the approximate time of the collision, at the location of the collision on Route 44. In addition, surveillance footage, admitted as an exhibit and played to the jury, showed the green RAV4 traveling behind Kewer's vehicle. No other vehicles similar to the green RAV4 were depicted in the surveillance video for a period of time both before and after the crash. Put simply, the identity of the driver of the green

RAV4 was not effectively contested and did not go to the heart of the defense. Under these circumstances we can state, with "fair assurance," that "the judgment was not substantially swayed by the [alleged] error." Id.

Judgment affirmed.

By the Court (Neyman, Henry & Singh, JJ.<sup>3</sup>),

  
Joseph F. Stanton  
Clerk

Entered: October 28, 2019.

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<sup>3</sup> The panelists are listed in order of seniority.